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The Briefs

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2007

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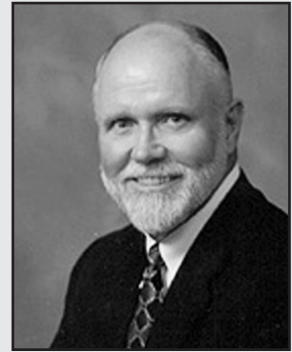
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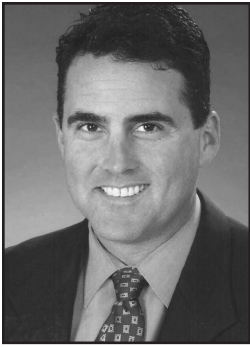
DEADLINE INFORMATION

Deadline for February Edition: 1/1/2007
The deadline for each edition will be the first day of each month. If that day falls on a weekend or holiday, the deadline will be the last working day prior.

Publication of advertising herein does not imply any endorsement of any product, service or opinion advertised. The opinions and conclusions, including legal opinions and conclusions contained in articles appearing in *The Briefs*, are those of the authors and do not reflect any official endorsement of these views by the Orange County Bar Association or its officers and directors, unless specifically stated as such.

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Lasting Liberty is Our Responsibility

— Thomas P. Wert

I was moved by the comments of Young Lawyers' President-Elect Liz McCausland and United States Senator Mel Martinez at last month's bar luncheon. For those of you who missed it, Liz's mother, Thuong N. "Cuc" Foshee, had been detained by the Vietnamese government for well over a year without being charged with any crime. She had purportedly spoken out against the Vietnamese government while she was in the United States. After her arrest, she was denied bail, denied an attorney, denied an adequate defense and denied sufficient dental and medical care. She was recently released and returned to the U.S. after her imprisonment garnered National attention, including that of Senator Martinez.

Senator Martinez almost single-handedly orchestrated Mrs. Foshee's release by threatening to block a Senate vote on the Vietnamese trade agreement on the eve of a November trip by President George W. Bush to Vietnam. The November Bar Luncheon gave Liz a unique opportunity to personally, and tearfully, thank Senator Martinez for his tremendous effort in bringing Mrs. Foshee home. It also gave Senator Martinez an opportunity to give the members of the Orange County Bar Association an impromptu first-hand account of Mrs. Foshee's release. It seems litigating personal injury cases in Orlando for 25 years, as Senator Martinez did in a past life, trains you very well for negotiating with the Vietnamese government.

As I reflected on Liz's and Senator Martinez's statements, it dawned on me that not only do we have much to be thankful for in this country, where notions of due process are mostly taken for granted. We also have a tremendous responsibility as lawyers to ensure that those basic rights are not overlooked. As lawyers, we all took an oath to support the Constitution of the United States and its underpinnings. I believe that means we have an obligation to educate those who may not understand constitutional principles and inform those who may be disengaged from civic and political institutions. I also think it means we have a duty to cry out when those basic principles are being compromised.

President Emeritus of Florida State University and past president of the American Bar Association, Sandy D'Alemberte, recently did just that in referring to Mrs. Foshee's release:

News of Foshee's trial and release comes at a time when the United States is conducting its own trials, many of them cloaked in the same shadows, away from the reach of international law, that clouded Foshee's case. As The Associated Press reported about the proceedings at Guantanamo Bay the very week of Foshee's release: The U.S. military called no witnesses, withheld evidence from detainees and usually reached a decision within a day as it determined that hundreds of men detained at Guantanamo Bay were "enemy combatants" ...

These proceedings were held pursuant to the Military Commissions Act of 2006, which became law in October. Prisoners were given little opportunity to contest allegations against them. After reviewing the transcripts, one legal scholar

stated, "These were not hearings. These were shams."¹

D'Alemberte went on to point out the irony in condemning the Vietnamese government for the very conduct that we are authorizing through Congress with the Military Commissions Act. He suggests that although the Golden Rule, i.e., do unto others ..., might not work in international politics, with these tribunals "we ought not continue down a path that diverges so sharply from core American values. ... When we diverge from those values, we quickly find ourselves without a moral basis to criticize when others violate fundamental human rights."

The American Bar Association has taken a similar stance. On September 19, 2006, ABA President Karen Mathis wrote a letter to all Members of the United States House of Representatives expressing the ABA's opposition to the Military Commissions Act. President Mathis stated that the Act departs from the well-tested standards of the Uniform Code of Military Justice and attempts to redefine the United States' existing treaty obligations in the treatment of detainees. Further, the Act removes all detainee *habeas* cases from judicial review, which the ABA obviously strongly opposes.

The ABA has adopted a policy calling upon the President and Congress to establish laws which provide for the prompt notice of charges, representation by counsel of choice, confrontation and examination of witnesses and an independent and impartial tribunal with the proceedings open to the public. The ABA has also urged Congress to establish clear standards and procedures for governing the detention and treatment of enemy combatants and to consider how national policy concerning these matters may affect the response of other nations to future acts of terrorism. These requests have been ignored.

D'Alemberte's comments and the policies of the ABA on this issue should be at the forefront of all of our thoughts. As attorneys, we have been entrusted with protecting the rights afforded by the Constitution. That means we should try to ensure that no *person* is "deprived of life, liberty or property without due process of law" and that

in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

It is our job to preserve the traditional core values of the American justice system. In Orange County, Florida, that means when my buddy, my boss or my brother-in-law tells me it's okay when an alleged terrorist is held in a 6x8 cell for 5 years without being charged, without legal counsel and without a public trial, I should say "No, it's not okay and if you want to know why, I can tell you more."

¹ Mark Denbeaux, Law Professor, Seton Hall University

Thomas P. Wert is a partner with Roetzel & Andress, LPA. He has been a member of the OCBA since 1993.

***S.C. Read, Inc. v. Seminole County
School Board,***

31 Fla. L. Weekly D1900a (Fla. 5th DCA 2006)

Dismissed sunshine law challenge
to school rezoning plan.

Marriott International, Inc.

v. Perez-Melendez,

855 So. 2d 624 (Fla. 5th DCA 2003)

Affirmed million dollar personal injury
verdict based on the "two issue rule".

Savoie v. Southeast Bank, N.A.

529 So. 2d 1275 (Fla. 5th DCA 1988)

Reversed and remanded mortgage
foreclosure for exercise of option
to purchase.

Pettry v. Pettry,

768 So. 2d 8 (Fla. 5th DCA 2000)

Reversed conversion of rehabilitative
alimony to permanent alimony.

Wenzel v. Boyles Galvanizing Co.,

920 F. 2d 779 (11th Cir. 1991)

Affirmed a 2.75 million dollar
personal injury award.

Winn v. Winn,

669 So. 2d 1155 (Fla. 5th DCA 1996)

Reversed "woefully inadequate"
permanent alimony.

McGhee v. Volusia County,

679 So. 2d 729 (Fla. 1996)

Clarified sovereign immunity/scope
of employment rules for deputy
sheriffs.

Brewer v. Flankey,

660 So. 2d 761 (Fla. 5th DCA 1995)

Reversed final judgment establishing
a prescriptive easement.

Rykiel v. Rykiel,

795 So. 2d 90 (Fla. 5th DCA 2000)

Reversed dissolution judgment due to
excessive awards against husband.

Acadia Partners, L.P. v. Tompkins,

759 So. 2d 732 (Fla. 5th DCA 2000)

Prevented multi-million dollar
judgment addition in complex
business litigation.

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Barry University School of Law Granted Full ABA Accreditation



Barry University's Dwayne O. Andreas School of Law has been granted full accreditation by the American Bar Association's Council of the Section of Legal Education and Admissions to the Bar, effective December 2, 2006.

Since ABA Provisional accreditation four years ago, the School of Law has experienced tremendous growth. Applications have doubled each year from 400 (2002) to 800 (2003) to 1600 (2004). For the past two years, over 2100 students have applied for the 200 seats available. The applicant pool is stronger than ever with a median LSAT of 150. The School of Law's influence and reputation has multiplied across the country and the world: Students in the most recent entering class hailed from 32 states and 2 foreign countries and represented 113 undergraduate institutions. Further growth is evident in the expanding enrollment and the full time faculty appointments. Since 2003, enrollment has approximately doubled from 311 to 575 students and the full-time faculty reached 29 this year. These outstanding groups of students and faculty who make up the School of Law community have worked diligently over the past few years capturing numerous national honors and experiencing success at several competitions:

- Barry Law Moot Court Team reaches the finals as one of only 28 teams in the country out of 255 to compete in the 57th Annual National Moot Court Competition in New York City this January 2007;
- 2006 "Best Brief," National Tax Law Moot Court Competition;
- 2006 Best Oral Advocates and first runner-up overall, Southeast Regional, National Trademark Law Moot Court Competition (Lefkowitz);
- 2005 and 2006, runner up, "Best Brief," National Sports Law Moot Court Competition (Tulane);
- 2005 Southeastern Regional champion and national final-four finish, American Trial Lawyers Association National Competition;
- 2005, "Best Advocate," St. Johns University Civil Rights Competition;
- 2004, runner up, "Best Oral Advocate," National Entertainment Law Moot Court Competition (Pepperdine);
- 2004 national champions, National Tax Law Moot Court Competition (Florida Bar).

John Horan, partner at Foley and Lardner, has chaired the Barry Law Advisory Board for the past two years. Under his leadership, the board has also grown remarkably and is currently comprised of 23 members of the local legal and business community as well as a few members outside Florida. The Advisory Board has been instrumental over the past few years as the law school navigated the accreditation process and developed its programs.

Barry Law's best voices in the local community are the 575 alumni who enhance the reputation of the School of Law each and every day. From leadership roles in state government to key roles in the OCBA YLS, Barry Law alumni demonstrate excellence through their outstanding work in local firms across the state and the country. Over two-thirds of the alumni base live and work in Orange, Osceola, Seminole, Volusia, Brevard and Lake counties proving that Central Florida is not only a great place to study law but also to pursue a lifetime of legal service. The School of Law proudly touts the work the alumni are doing and eagerly anticipates their future success.

Barry University School of Law invites the members of the Orange County Bar Association to join in a celebration on **January 12th at 4:30 PM** on the law school campus. The School of Law will continue the celebration as it honors Dick Batchelor and celebrates full approval on **March 2-3, 2007** at the Golf Tournament and Black Tie Gala.

The Barry University School of Law community thanks the Orange County Bar Association for its continued support and looks forward to growing with the Central Florida Legal Community.

Submitted by Joseph Richard Hurt, Dean of the Barry University Dwayne O. Andreas School of Law since 2003. Dean Hurt has been a member of the OCBA since 2005. (Photograph courtesy of Robinson Pamplona, Barry University.)



OCBA Legal Aid News

Pro Bono Spotlight – Charles "Chuck" Stepter

Legal Aid Society of the OCBA



Although many people know about the Guardian *ad Litem* (GAL) Program of the Legal Aid Society, few understand the impact the program has had on the lives of thousands of children in Central Florida. Unless you have sat in juvenile court and heard the evidence of the overwhelming difficulties dependent children face, it is difficult to comprehend how the court works together with the Department of Children and Families, the parents' attorneys, and the Guardian *ad Litem* Program to make parental decisions for children as young as one day old. The GAL Program and the attorneys appointed by the court work within the system to advocate for the best interest of the child. There are many *pro bono* attorneys who dedicate their time, energy, resources and commitment to the GAL Program, and they have become essential to the program's successful achievement of its goals - safety, permanency and effective services - to the children it serves.

One such attorney is Charles "Chuck" Stepter. He has not only served the Legal Aid Society in various capacities since 1972, including serving for a time as a member of the Board of Directors, but has also been a Guardian *ad Litem* for more than 100 children. As an advocate for these children, Chuck enabled them to access desperately needed services that most families take for granted, such as simple, routine dental care. For others, it may mean advocating for a child who otherwise

might face a life as an undocumented immigrant with no possibility of returning to the only country he or she knows as home. Yet these services and other more tenuous legal battles confront dependent children every day. Without a Guardian such as Chuck, the children could face confusion, delay or even a complete denial of needed services.

Sarah Wallerstein, an Equal Justice Works Fellow Attorney who specializes in education issues for the GAL Program, states: "Chuck exemplifies what it is to be the ideal *pro bono* GAL. The time and resources that he contributes to his cases are second to none. He connects with his clients, takes the time to determine what their most important needs are and stops at nothing to achieve those needs."

Indeed, because of his work, many children have been able to achieve the stability they require in order to become successful adults. Chuck's work on behalf of dependent children, as all his work on behalf of the Legal Aid Society of the Orange County Bar Association, makes him an indispensable attorney to our community.

Thank you, Chuck Stepter, for your dedicated efforts on behalf of the Legal Aid Society!

Submitted by the Legal Aid Society of the Orange County Bar Association.

Congratulations

**Please join
Ingrid A. Keller, attorney at law,
and the staff of
N. Diane Holmes, P.A.
in recognizing and congratulating
N. Diane Holmes for having
been named a fellow in the
American Academy of
Matrimonial Lawyers.**



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Professionalism Committee

Practicing With Professionalism - We Owe It to Our Clients, to Our Legal System and to Ourselves

Thomas A. Zehnder



As lawyers, we are all mindful of trends in our profession, both positive and negative. Some commentators have noted that there has been a growing perception over the years that professionalism is on the decline, whether it is because of the use of “Rambo-litigation” tactics, the prosecution of meritless claims, or the adoption of just plain incivility. I consider myself very fortunate to practice law here in Orlando, where I believe such a trend – if there is one – is on the decline. Our bar should be proud of its tradition and commitment to practicing with professionalism. Our local judiciary leads the way, embracing professionalism as a fundamental aspect of practicing law here in Central Florida. Our federal judiciary’s Handbook on Civil Discovery Practice begins with the statement that:

Discovery in this district should be practiced with a spirit of cooperation and civility. The district’s lawyers and the Court are justifiably proud of the courteous practice that is traditional in the Middle District. Courtesy suggests that good faith consultation is appropriate before commencing action that might result in disagreement among counsel.

Similarly, each of our state judges prominently displays plaques in their courtrooms that read “Professionalism Demands Courtesy.” Our OCBA is grounded on these principals as well, defining its very mission to be the promotion of “honor, dignity, service, truth and professionalism.” These principals are not aspirational goals – they are guidelines that we must all adopt and implement in our daily practice. Why? There are at least two reasons. First, as lawyers we owe our clients a duty to practice with professionalism and our system of justice depends on it. Yes, that’s right – zealous advocacy *requires* professionalism. Second, we owe ourselves, as lawyers, a duty to protect our integrity by practicing with professionalism.

The Duty to Our Clients and to Our Legal System

A lawyer’s duty is to represent the client with zealous advocacy. Indeed, our adversarial system of justice is based on this standard of care. Yet, many people misunderstand what this standard is really all about. It does not mean that lawyers should be difficult, or obstructive, or abusive. It does not mean that lawyers should act like bulldogs in the courtroom or in deposition, or should treat their opponents with disdain or with offensive and demeaning personality. And it does not mean that lawyers are hired guns or legal mercenaries whose job is to win at all costs and by any means necessary. This is so even if the lawyer who engages in such behavior has broken no law or has somehow avoided sanctions.

Zealous advocacy requires that the client’s interests are served first. Offensive, obstructive and abusive tactics make the lawyer less effective, not more so. In my experience, this type of conduct often costs the client far more, not only in additional fees spent on unnecessary and unfounded discovery disputes, but also in the lawyer losing sight of and focus on the real issues in the case. In an article I recently read on professionalism, the authors astutely commented that:

Zealousness is no excuse for vulgar, insulting and unprofessional actions. Even attempting to label such actions and words as zealous advocacy cheapens and mocks the true meaning of this concept.

* * * *

Where language or tactics have no identifiable purpose other than to threaten, embarrass, delay, criticize, or attack opposing counsel, the client’s interests have been abandoned.

Joseph J. Ortego and Lindsay Maleson, *Under Attack: Professionalism in the Practice of Law*, 2003 Emerging Issues in Motor Vehicle Product Liability Litigation, Phoenix, Arizona, March 20, 2003.

In reaching their conclusion, the authors relied on the Delaware Supreme Court’s decision in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993), in which the court noted:

Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client’s legitimate interests by a professional, courteous, and civil attitude toward all parties involved in the litigation process. A lawyer who engages in the type of behavior exemplified [by counsel] on the record [in the]...deposition [at issue] is not properly representing the client, and the client’s cause of action is not advanced by a lawyer who engages in unprofessional conduct of this nature.

Id. at 54.¹

Our effectiveness as lawyers, and the effectiveness of the legal system as a whole to properly administer justice, depends on our civility and on our professional conduct.

The Duty to Ourselves

Recently, I was talking to a client, who also happens to be a lawyer, about his thoughts on professionalism and he told me what he learned while clerking for the Honorable

Continued on page 8

Walter K. Stapleton, a judge on the United States Court of Appeals for the Third Circuit. Judge Stapleton taught my client (and, now the rest of us) that your integrity is your own. It is an attribute you are born with, intact when you begin your legal career. You control it completely, and no one can take it away from you. You are the only person who can put your integrity in play. Some may lose it in one fell swoop by taking clearly inappropriate action. But, perhaps more often, others lose it over time by "a death of a thousand cuts"; slowly their integrity erodes away by taking liberties here or cutting corners there. Without your integrity, you can no longer function as an effective lawyer. Your clients will not listen to you because they no longer trust the legal advice you give. Your opponents will not listen to you because they've seen that your word is not reliable. And the judges will not listen to you because they know what you say about the facts or the law cannot be trusted. These are the death knells of a failed legal career. We owe it to ourselves to maintain our integrity, our professionalism, and our civility. Without them we cannot be what we have chosen to be: lawyers in this community.

In closing, I offer for your consideration the words of two commentators who have expressed these same sentiments far more eloquently than I. I hope that you find their words insightful, and maybe even inspiring, as I have:

As lawyers and judges, we live out who we are by our actions. Professionalism is not something to don

at the office or take off with our suits and our robes; our behavior continuously demonstrates who we are. We can improve our own lives and spirits, those of our clients, opposing counsel and parties and the community as a whole, if we simply remember that our part in the system gives us tremendous power, to make life better for every citizen..... If every lawyer and judge...would analyze every action she or he takes in light of the goal of ensuring that the system works fairly and efficiently for everyone, questions about professionalism would simply disappear - and tremendous good would result for our community.

Wallace P. Carson, Jr. and Barrie J. Herbold, *Why "Kill All the Lawyers"?*, 59 Or. St. B. Bull. 9, 12 (Jan. 1999).

Let us all take pride in practicing with professionalism - for our clients, for our system of justice, and for ourselves.

I've intentionally not revealed the offending lawyer's identity here - his name, along with his abusive and outrageous conduct during the deposition in question, are forever memorialized in the reported decision. Interestingly, the court concluded its opinion with an "invitation" to the lawyer, who was from Texas, to voluntarily appear before the court to explain his conduct and to show cause why his conduct should not serve as a bar to any future appearance in a Delaware proceeding.

Thomas A. Zehnder, recipient of the 2006 Lawrence G. Mathews, Jr. Young Lawyers Professionalism Award, is a partner with King, Blackwell, Downs and Zehnder, P.A. He has been a member of the OCBA since 1996.

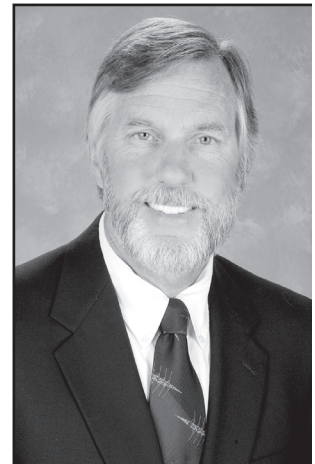
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Issues in Family Law

Collaborative Law – A New Version of Family Mediation

Shannon L. Daniels



The History

In 1988, Stuart Webb, a Minneapolis family law lawyer, was considering quitting the practice of law due to what he termed “family law burnout” and the negativity involved in the practice of family law.¹ Instead, Webb creatively addressed his frustration with family law practice by his unprecedented decision to practice law without going to court and by only representing clients in negotiations that were aimed solely at creative settlements and required full client participation.² In cases where these settlement negotiations broke down, Webb withdrew as counsel and required the client to obtain a separate litigation attorney.³ According to Webb, the opportunity for settlement is enhanced once a lawyer is no longer subconsciously focusing on trial preparation and the attorney’s success depends on settlement.⁴ During the first two years of this innovative practice, Webb handled 99 such cases and managed to settle all but four.⁵ After experiencing the success of Webb’s new “collaborative law” model, Webb and several other Minneapolis practitioners founded the Collaborative Law Institute.⁶ The Collaborative Law Institute is a non-profit organization whose mission is to create and practice “collaborative non-adversarial strategies to help clients in family law matters achieve agreement in a dignified and respectful manner.”⁷

From its conception in Minneapolis, the collaborative law model soon spread to California where the Collaborative Divorce group in northern California sought to improve and expand upon Webb’s vision.⁸ The group espoused that, given the emotional, legal and financial complexities of divorce, families would be better served by a team of professionals from separate but distinct disciplines including the legal, mental health, and financial professions.⁹ However, in keeping with Webb’s original collaborative model, the group felt that all members of the team should adhere to Webb’s original withdrawal stipulation.¹⁰ Thus, under the group’s team-based collaborative law model, if the parties decided to opt for a litigation-based resolution, all team members would withdraw and none of the collaboratively produced materials could be used in the subsequent litigation process.¹¹

The Process

Based on the above-described team-based approach, clients may become associated with the collaborative law concept through the guidance of an attorney, a therapist, or a financial professional, one of whom has been trained in the collaborative law model. Since its inception, the collaborative law movement has spread to several states, including California, Connecticut, Florida, Georgia, Massachusetts, New Hampshire, New Jersey, North Carolina,

Ohio, Oregon, Pennsylvania, Texas, and Utah, and several Canadian provinces.¹² Collaborative groups have been established that operate statewide or within certain counties or metropolitan areas. Participation in the collaborative law movement requires membership and training from a local collaborative law group. Professionals in the legal, mental health, and financial professions should check with their local collaborative law group for membership and training information.

The Team

The Legal Coach:

The legal portion of the collaborative process begins with the initial consultation. Attorneys should address all options for dispute resolution including litigation, mediation, and the collaborative process. The decision to pursue any of these options over another lies with the client. Once the client has decided to pursue the collaborative law process, the client’s spouse must also agree to participate in the collaborative model and must use another attorney trained in the collaborative law process.

Once both parties have chosen the collaborative method for dispute resolution, each party signs a participation agreement with his or her respective attorney. This participation agreement is similar to a standard representation agreement or fee contract; however, the participation agreement must specifically include the stipulation permitting the attorney to withdraw in the event the parties decide to pursue litigation. While some collaborative law groups generate participation agreements to be used by all group members, others permit members to draft individual participation agreements.

The attorney, serving as the client’s legal coach, works with the client, the spouse, and the spouse’s attorney to create the team of professionals which will guide the parties through the collaborative process of divorce, which includes several four-way sessions where creative settlements can

Continued on page 16

¹ Pepperdine 4 Pepp. Disp. Resol. L.J. 351

² Pepperdine and Collaborative Where Did it Come From (Tesler)

³ Pepperdine and Collaborative Where Did it Come From (Tesler)

⁴ From the Collaborative Law Corner, Stu Webb found at <http://www.collabgroup.com> (visited Jan. 18, 2005)

⁵ Pepperdine and Collaborative Where Did it Come From (Tesler)

⁶ Pepperdine and Collaborative Where Did it Come From (Tesler)

⁷ Collaborative Law Institute Website (visited Jan. 18, 2005) <<http://collaborativelaw.org>>.

⁸ Collaborative Divorce an Interdisciplinary Model (Ross)

⁹ Collaborative Divorce an Interdisciplinary Model (Ross)

¹⁰ Collaborative Divorce an Interdisciplinary Model (Ross)

¹¹ Collaborative Divorce an Interdisciplinary Model (Ross)

¹² Collaborative Divorce an Interdisciplinary Model (Ross)

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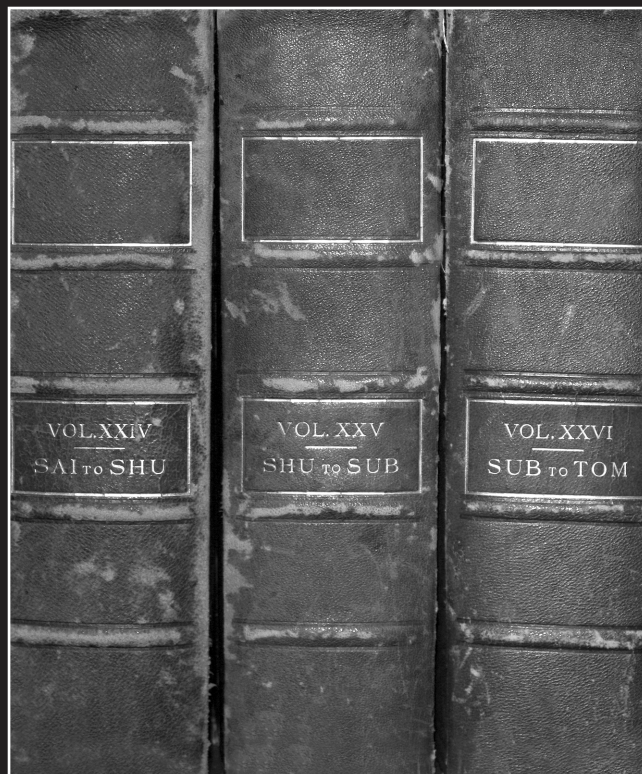
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Social Committee

The Social Committee is Fun . . . And a Whole Lot More!

— Woody Rodriguez



Since its inception two years ago under then President Wayne Helsby, hundreds of Orange County Bar Association members have attended at least one of our social events. But what you may not know is that the OCBA Social Committee is one of the best committees to join because of the hidden perks that will ultimately benefit you professionally.

Under the leadership of Kristyne Kennedy, the Social Committee has emerged as a way to develop social events of interest to members that were hesitant to attend events sponsored and organized by the Young Lawyers Section (YLS). That is not to say that the YLS events are restricted to young lawyers. Events such as the Annual YLS Golf Tournament and the Evening with Judiciary are typically attended by lawyers of all ages. However, only young lawyers are involved in the planning of these events. So the Social Committee was born to help fulfill the desire of those lawyers that wanted to organize social events for the benefit of the bar's general membership. In fact, prior to the creation of the Social Committee the only social event that was not sponsored exclusively by the Young Lawyers Section was the Annual Gala.

This past year the Social Committee has organized four signature events, including the upcoming Wine and Cheese Reception, the recent Poker Tournament, the Summer Trivia Contest and the Joint Bar Happy Hour, which was co-sponsored along with the Central Florida Association of Women Lawyers, the Hispanic Bar Association, the Paul C. Perkins Bar Association and the Young Lawyers Section of the OCBA. Some of these events, such as the Poker Tournament, double as fundraisers for the OCBA Foundation. What most OCBA members don't know is that the folks involved in planning these events also have plenty of fun in advance of the actual event through a series of short "after hours" meetings.

As the Social Committee chair, Kristyne is the central contact for coordinating the date of all scheduled events, but each event also has a specific chair. For example, for the

upcoming Wine and Cheese Reception, attorney Chelsea Roberts has volunteered to head up the event and works independently to help make the arrangements for the event. She gets the support of other OCBA members that meet as part of a planning committee for about an hour twice per month in advance of the event. The volunteers that attend these informal gatherings number from two to 12, but their responsibilities and obligations vary based on their available schedules, and no one is ever required to take on any assignment unless he or she is able and willing to contribute.

More importantly, because the gatherings are small and informal, these colleagues, while gathered, share information on their practice areas, their families and their general interests. The business portion of the meetings eventually give way to these other social topics, and referrals and friendships are generated without the awkwardness that can sometimes inhibit such bonds from forming in traditional social gatherings. In addition, committee members develop contacts with restaurateurs, wine shop owners, hotel and catering managers and others while learning how to organize and plan a successful social event from other committee members. These skill sets and contacts ultimately become useful in other settings of your daily life, including planning firm celebrations or hosting a fundraiser for another board of civic importance.

The best part is that to take advantage of this great committee all that is needed is a couple hours of your time and a willingness to have fun. No additional dues or other monetary contributions are required, as the events are typically self-funded. So if you want to meet other hip and active attorneys in Orange County that like to host parties and perhaps raise a little dough for the Foundation along the way, get involved by contacting Kristyne Kennedy with the firm of Jackson, Lewis at kennedyk@jacksonlewis.com.

Diego "Woody" Rodriguez is an associate with Marchena & Graham, P.A. He has been a member of the OCBA since 1998.

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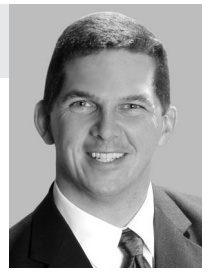
Is your firm part of the 100 Club? Any firm with two or more attorneys and 100% membership in the OCBA can be a member of the 100 Club. If you think your firm is eligible, e-mail a typed list of your attorneys to Susan Laviolette at susanl@ocbanet.org and she'll let you know!



Presentation Skills for Lawyers

How to Create a Winning Record – Part 1

Elliott Wilcox



Think back to your last deposition or court hearing. Did every word you said actually make it into the record? Will the transcript of the deposition persuade the jurors during trial? Will your trial record withstand appellate attacks?

Lawyers know that it's not enough to win the case at the trial level. You also need to win the case on appeal. A key ingredient in that winning recipe is a clear trial record. In this article, you'll discover the secrets of working with court reporters to create a winning record.

Please note that I didn't come up with these ideas on my own. If you want to learn anything, you should talk to the experts, and that's exactly what I did. Not long ago, I was sitting with a court reporter, waiting for the deponent to arrive. The deposition had been scheduled for 3:00 PM, but it was almost 3:15 PM, and the witness still had not arrived. That's not unusual in criminal cases, where subpoenas are often treated more like party invitations ("Maybe I'll attend, maybe not. It depends on what else I've got planned that day...") than orders of the court. Anyway, while we were waiting, a second court reporter (whose deponent had also failed to appear) poked her head into the room.

Before long, the three of us started compiling a list of the most common mistakes lawyers make when working with court reporters. Over the next few weeks, almost a dozen other court reporters added their input to the list. They not only told me all of the things lawyers do that contribute to a confusing record, but they also revealed techniques for avoiding the problems and ensuring a clear appellate record.

Remember, your goals and the court reporter's goals are closely aligned. You both want to ensure a clean, clear record that is upheld on appeal. Here are the tips they shared to help you achieve that goal:

1. Create a vocabulary list. Creating a clean record starts **before** you go to court. If you want to ensure a clear record (and make friends with the court reporter), type up a list of your witnesses' names, as well as any unusual terms that the reporter may have difficulty spelling. Consider including medical terms, street names, case citations, and numbers. If you spell it out in advance, you probably won't have any troubles during trial (and you won't get interrupted by a reporter asking for clarification, either).

2. Ask the witness to spell any unusual names or terms. If you've given the court reporter a copy of your vocabulary list, you won't need to spell many names, but you still may want to clarify things. If an unexpected vocabulary word arises, ask your witness to spell the name aloud. Even better, you might want to spell it yourself, then ask for confirmation from the witness ("That's spelled 'L-Y-N-Y-R-D S-K-Y-N-Y-R-D,' right?").

3. Stop talking over one another. When you interrupt the other attorney, the judge, or a witness, your record will look like it's been run through a blender. For example, this is what

that memorable scene from *A Few Good Men* would look like in the appellate record:

Attorney: Who ordered the Code Red?

Witness: You want the truth?

Attorney: Yes, that's what I've been –

Witness: You want to know who –

Attorney: – trying to get from ---

Witness: – ordered the Code Red? You can't –

Attorney: – you this entire time, –

Witness: – handle –

Attorney: – but you've been –

Witness: – the truth!

Attorney: – stonewalling me all day!

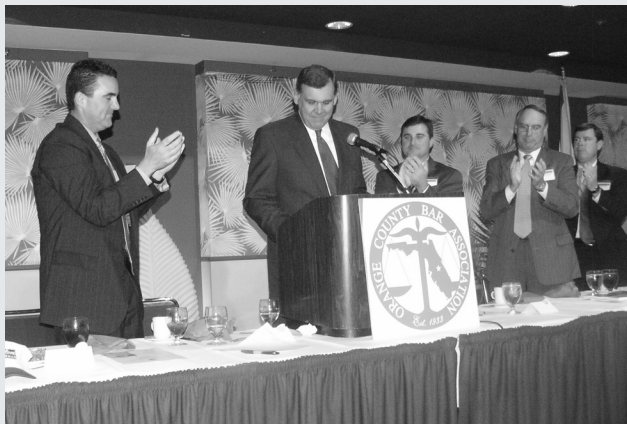
Although this exchange may have been easily understood when it was spoken aloud in court, your transcript is going to be difficult, if not impossible, to decipher later on. Keep in mind that many times, court reporters may only hear the loudest voice in the room. If you're interrupting a witness, you may be drowning out valuable impeachment material.

Not every interruption is intentional. Many times, nervous witnesses stammer in the middle of their answers. You think that the witness is done, and jump in with your next question, only to have the witness start talking at the same time. To avoid these problems, wait for the witness to finish before you ask your next question. If you pause for one second after he or she finishes, you shouldn't ever talk over the witness.

4. Describe the action. In court, the presentation was fantastic. The prosecutor was trying a DUI case, and he asked the police officer to demonstrate the Field Sobriety Tests. The officer showed the jury how the defendant stumbled and nearly fell down, then demonstrated that the defendant performed the "Chicken Dance" instead of walking in a straight line. The jurors laughed until tears rolled down their cheeks. One of them said, "Jeez that guy was wasted - I'm ready to vote guilty now!" Unfortunately, that demonstration never made it into the record because the prosecutor didn't describe what was happening.

The first time I learned this lesson was during a read-back of testimony in a jury trial. The presentation during trial had been riveting, but during the read-back, none of the non-verbal actions made it into the record, so it was a very dry recitation. Anytime you use an in-court demonstration, make sure that it goes into the record by describing the activities the appellate court won't see. For example, while the police officer demonstrates how the defendant performed during the Field Sobriety Test, you could say, "You are now hopping up and down on one foot, your hands are tucked into your armpits, and you are flapping your arms like a chicken's wings." Now it's "on the record" and the appellate panel will be able to "see"

Continued on page 19



U.S. Senator Mel Martinez is welcomed to the November Luncheon by OCBA President Tom Wert, President-Elect Gene Shipley, Judge John M. Kest and Charles Kiester of Thompson/West.



Liz McCausland spoke at November's Luncheon about her mother's imprisonment in Vietnam. Liz gave a moving account of "Cuc" Foshee's painstaking work in making a piece of string by which she passed food to other prisoners, and she thanked the entire legal community for its support in helping to gain her mother's freedom.



Gene Shipley presents Ana Tangle-Rodriguez of Tangle-Rodriguez & Associates with a 100% Club certificate. Firms whose attorneys all belong to the OCBA are recognized at monthly luncheons for their support of the Bar.

Goodbye 2006, hello 2007!! Once again the year has flown by and we are looking back at the past year wondering where the time went. Well, stop looking back - there's no time for that! Enough of pondering fond memories and unforgettable moments (or maybe regrets) from 2006 - now it's time to get ready for the year ahead and look forward to a fabulous 2007! Once again, there is already plenty of exciting news to report about your fellow OCBA members! So, here's what's up....

The OCBA's Law Week Committee, co-chaired in 2006 by **Lori Spangler** of the Public Defender's Office and **Lissa Bealke** of The Construction Law Firm, has been invited to submit a summary of its Law Week publicity strategies for inclusion in the ABA Division for Public Education's annual Law Day Planning Guide. Lori, Lissa and the committee will be recognized for their winning strategies, which is an honor accorded to only the most successful Law Day programs in the country.

Congratulations to newly named shareholders **Ryan Davis** and **Lance Ragland** of Winderweede, Haines, *et al.*, and **Mark Chmielarski** of Greenspoon Marder, P.A.! **N. Diane Holmes** of N. Diane Holmes, P.A. has been asked to be a fellow of the American Academy of Matrimonial Lawyers. Long & Gonzalez attorney **Todd Long** was approved as a board member of the UCP of Central Florida. Gov. Jeb Bush appointed **Lou Frey** with Lowndes Drosdick, *et al.* to the board of directors of the Florida Sports Foundation and reappointed **Marcos Marchena** with Marchena and Graham P.A. to the Florida Transportation Commission, pending senate confirmation.

A new survey of more than 250 corporate counsel ranked **Holland & Knight LLP** as one of the nation's top three law firms for delivery of superior client service. This is the fifth year that Holland & Knight has been named to the BTI Consulting Group, Inc.'s list of Top 30 law firms for client service - a distinction held by just four other firms. Congratulations to the following OCBA members who were recognized in the *Orlando Business Journal's* annual Best of the Bar survey: **David James Akins**, **Bruce Blackwell**, **Usher Brown**, **David Cannella**, **Harvey Cohen**, **Jules S. Cohen**, **Ava Doppelt**, **Frank Eidson**, **Dorothy F. Green**, **Robert D. Henry**, **Todd Hoepker**, **Jeffrey Mandel**, **George A. Meier, III**, **Chandler R. Muller**, **Rebecca Palmer**, **John Ruffier**, **William Ruffier**, **Gary Salzman**, **Kurt Spengler**, **Susan Stucker**, **James Turner**, **Michael Walsh** and **Kay Wolf**.

Dellecker, Wilson, King, McKenna & Ruffier recently helped to raise \$10,000 for the Ronald McDonald House Charities of Central Florida at their annual holiday party in November that was attended by more than 600 clients and friends. Firm partner **Ken McKenna** serves on the board of directors of Ronald McDonald House. The law firm of **Mateer Harbert, P.A.** has joined forces with other companies through Habitat for Humanity Orlando to help longtime Orlando resident Tijuana Baker and her family make the dream of home ownership a reality. The companies pooled their resources to provide subcontractors, volunteers and funding for the construction, slated to be complete by February 2007. **Graham, Builder, Jones, Pratt & Marks, LLP** helped to collect food and toys for the Community Service Center of Orange County, Inc. by

Kristyne Kennedy

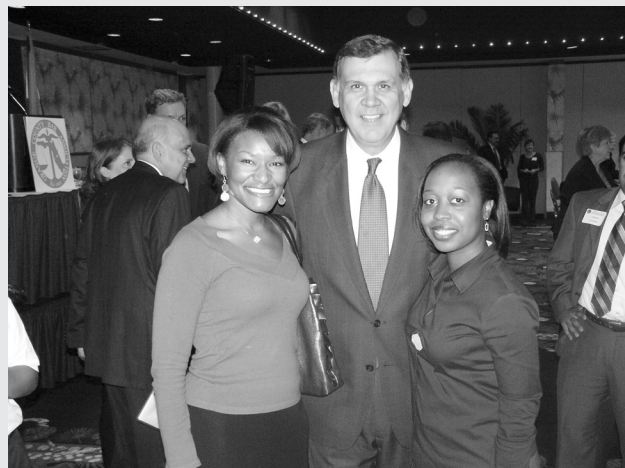
holding a Thanksgiving Food Drive and Holiday Toy Drive to benefit the center.

The OCBA's charity poker tournament on November 15 turned out to be yet another fantastic event organized by the Social Committee! The tournament raised money for the OCBA Foundation Inc., and players included local celebrities and distinguished guests. Top winners were: (1) **Adam Scott**, (2) **David Bibb**, (3) **Michael Cantrell** and (4) **Kico Diaz**. Special honors go to **Danielle Feulner** (top female player) and Channel 6 reporter **Todd Jurkowski** (top celebrity player). Many thanks to our "Royal Flush" sponsors: **ESQUIRE LITIGATION SERVICES, SHUTTS & BOWEN** and **JEFFREY FEULNER, P.A.** Special appreciation also goes out to everyone who helped with this event, including **Woody Rodriguez** and **Steve Jacobs** (Event Co-chairs) and the rest of the Social Committee, volunteer law students and **Kelly Ekas** and the fabulous staff of **Slingapours!** Finally, my personal and sincere thanks to the "**YLS Presidents Choir**" (**Wiley Boston**, **Nick Shannin** and **Woody Rodriguez**) for leading the crowd in singing happy birthday to Steve and me, and to everyone who gave me special birthday "greetings" throughout the evening. So, now on to the next great OCBA social event - the **Winter Wine & Cheese Party** on **Thursday, January 25, 2007**. This year the event is scheduled to take place at Beluga's in Winter Park, so RSVP early because this it is sure to be another sell-out! For more information, contact Event Chair **Chelsie Roberts** at CRoberts@fordharrison.com.

Finally, I'm thrilled to report that November brought wonderful news for YLS President-Elect **Liz McCausland** and her family, who happily celebrated her mother's long awaited homecoming just in time for the holidays. Liz's mom, **Thong Nguyen "Cuc" Foshee**, returned home after being held by the Vietnamese government for over a year without any formal charges. An American citizen, Ms. Foshee was visiting family in Vietnam in September 2005 when she was accused by the government of being a terrorist. She was detained in jail for over a year, where she had limited medical attention and was denied access to an attorney. At the November OCBA luncheon, Liz had the opportunity to express her appreciation to Senator Mel Martinez who had been instrumental in helping to get her mother home. Liz described her mother's moving story to luncheon attendees and also thanked members of the Orlando legal community who had supported her cause, including attorneys with **Holland & Knight** and Liz's law firm of **Cooney, Mattson, Lance, Blackburn, Richards, & O'Connor, P.A.** We are all very happy for Liz and her family, and her story is a powerful reminder to all of us to be grateful for those things in life we so often take for granted.

So, until next month, take time to appreciate those basic things like due process, free speech, family, friends, good health or even just your favorite chicken sandwich. As bad as our problems may seem sometimes, we still have it pretty good. As always, keep sending your interesting news or updates to me at kennedyk@jacksonlewis.com or fax (407) 246-8441.

Kristyne E. Kennedy is an associate with Jackson Lewis LLP. She has been a member of the OCBA since 2001.



Nicole Smith of Nardella Chong, P.A. and Lyneda L. Shorter of the Dept. of Children & Families take a few moments after the Luncheon to meet Senator Martinez.



Elementary school children from St. James Cathedral School entertained members at November's Luncheon with holiday songs. Their performance was fitting for the occasion - Senator Martinez, who grew up in Orlando, attended the school.



Ronald McDonald House Charities of Central Florida Board Member Ken McKenna, Executive Director Lou Ann Devoogd, Marketing and Communications Manager Laura Heidrich and Board Member Brian Butler are all smiles at Dellecker, Wilson, King, McKenna & Ruffier's Nov. 16 holiday party which raised \$10,000 for their organization.

be created. Generally, a collaborative team consists of two collaborative attorneys, two licensed mental health professionals serving as "divorce coaches," another licensed mental health professional serving as a child specialist, and a financial specialist familiar with the financial aspects of divorce.¹³ All members of the team must be trained in the collaborative law process.

The Divorce Coach:

Most parties will benefit from a gender-balanced coaching team.¹⁴ The idea behind pairing male divorce coaches with male clients and female divorce coaches with female clients may stem from Deborah Tannen's book, *You Just Don't Understand*, which explains how certain differences in the socialization of males and females contributes to difficulties in understanding one another.¹⁵ This communication problem, often exacerbated during the divorce process, can be alleviated by the gender-balanced approach.¹⁶ Divorce coaches focus on the emotional piece of the divorce process by teaching the client self-management skills including anger management, stress reduction and communication skills. Parties with children will work specifically on co-parenting techniques and communication. Often divorce coaches will meet in four-way sessions to assist clients in the use of the newly developed communication and negotiation strategies. These new skills empower both parties to effectively communicate and relate during the remainder of a co-parenting relationship.

The Child Specialist:

A third mental health professional, the child specialist, serves as an advocate for the child. The child specialist assesses the child during individual appointments and appointments with each parent. The child specialist should assess the child's "development, temperament, relationship to family members - including extended family, - interests, emotional attachments and support structure, beyond the family."¹⁷ The child specialist works to support the child by providing an outside confidant while educating the parents and enhancing the parents' awareness of and sensitivity to the child's feelings and needs. The child specialist's role is not to take sides or assign blame for specific problems, but to identify problems from the child's perspective and share them with the parents in a fashion that promotes resolution of that problem. Child specialists participate in four-way sessions by assisting the parties in creating specific parenting plans designed to appropriately and adequately address the

child's needs.

The Financial Coach:

The financial coach is a neutral party in the collaborative process charged with assisting the parties in gathering and organizing household financial information. These coaches typically have financial planning backgrounds and are Certified Financial Planners or Certified Divorce Planners. In the litigation-based model, each party independently gathers financial information and supplies this information to his/her attorney. The attorney passes the information on to opposing counsel in order to facilitate legal settlement. The collaborative model offers the parties the opportunity to sit down together with a financial coach and address the parties' assets and liabilities, the living expenses of a divided household, and tax ramifications of contemplated settlement terms. During this information gathering stage, the parties are discouraged from attempting to negotiate distribution of any assets or liabilities. The financial coach may assist one or both parties in creating a realistic post-divorce budget. Financial coaches can work with the less financial-savvy spouse on basic financial education including budgeting, tax issues, balancing a checkbook, or understanding retirement accounts. Common roadblocks to settlement including fear of the financial impact of divorce and suspicion of hidden assets can be alleviated by the education and information-gathering assistance provided by the financial coach.

The team-based approach is grounded in the age-old adage, "two heads are better than one." Open communication between all team members is essential to any settlement. Active participation by each team member during four-way sessions leads to multiple settlement options that attorneys working across from each other during a mediation may not have envisioned or conceived. Participation of professionals from multiple fields and clients who are personally vested in the outcome vastly increases the number of possible ideas that can be adopted into the parties' settlement.

¹³ Collaborative Divorce an Interdisciplinary Model (Ross) and Collaborative Divorce What is it? (Thompson and Nurse)

¹⁴ Collaborative Divorce What is it? (Thompson and Nurse)

¹⁵ Tannen *You Just Don't Understand* and Collaborative Divorce What is it? (Thompson and Nurse)

¹⁶ Collaborative Divorce What is it? (Thompson and Nurse)

¹⁷ Collaborative Divorce What is it? (Thompson and Nurse)

Shannon Daniels, an associate with the law firm of Wendy L. Aikin, P.A., has been a member of the OCBA since 2002.



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YLS on the Move!

A Brand New Year

— Judi Garabo

I'm not going to bore you with the usual recitation of New Year's Resolutions – exercise more, lose weight, stop drinking/smoking/fighting/swearing/bouncing checks/forgetting to return library books – but I do think that January is a unique time for all of us to ponder where the year ahead will take us, how far we've come since January 2006 and where January 2008 will find us. It's easy for me to say, because the year ahead holds a spring wedding for me (and, in turn, a new by-line in my May column and beyond). For my beloved Seminoles, the coming year holds the promise of a "rebuilding year" and the prospect of winning more than 50% of our games. Hope springs eternal, and a lifetime spent rooting for the Red Sox has prepared me for this. What does the coming year hold for you, and what can you do to make it happen?

If increased service to the community at large and the legal community specifically are on your "to-do" list this year, you will have a few great opportunities in January. On January 18, 2007, the YLS presents **Holidays in January** at the Jackson Community Center on West Carter Street. **Lisa Geiger** (lgeiger@butlerandhosch.com) and **Molly Young** (meyoung20@aol.com) will be heading up this project, which finds the Young Lawyers donating time, money and toys galore to the children at the Center. Over the past few years, we've presented Holidays in January at the Coalition for the Homeless and, despite a change in location, we're prepared to bring toys, games, and snacks to the children at the Jackson Community Center who may not have had as abundant a Christmas as the rest of us. If you want to donate toys, please bring them to the January YLS lunch for collection, and please consider donating your time as well. Volunteers should be at the Jackson Community Center around 4:00 p.m. to help set up and pass out toys.

If your resolutions include a commitment to more substantive professional development, the Florida Bar YLD offers its **Affiliate Outreach Conference** during the weekend of February 2nd and 3rd in Ponte Vedra, Florida. The Conference includes presentation of awards to the Outstanding Florida Young Lawyer Affiliate, Outstanding Public Service Project and Outstanding Member Service Project. CLE will be offered for a diversity seminar. Any young lawyers are invited to attend. Please let **Heather Pinder Rodriguez** know if you want details. You can reach her at heather.rodriguez@hklaw.com.

Additionally, in January, the **Florida Bar's Mid-Year Meeting** will be held at the Downtown Hyatt Regency in Miami. For any Young Lawyers planning on attending, the Florida Bar Young Lawyers Division will be presenting its annual Government Symposium, featuring a panel discussion about lobbying, for which CLE credit is available. This takes place on Friday, January 19, 2007, from 2:00 p.m. to

4:00 p.m. For those not physically in attendance, a webcast will be offered. YLS Board Member and Florida Bar YLD liaison **Heather Pinder Rodriguez** has more information.

Looking ahead, in March, the Young Lawyers Section will bring you the **Evening with the Judiciary**. Tentatively, it's scheduled for March 27th at a location to be announced. If you would like more information or if you are interested in sponsorship opportunities, please get in touch with this year's event chairs, **Jeremy Springhart** (jspringhart@broadandcassel.com) or **Tony Sos** (asos@dwklaw.com). Before that, though, on St. Patrick's Day (March 17), join us for the **Young Lawyers Section's first (hopefully) annual softball tournament**. **Shane Fischer** (sfischer@boginmunns.com) and **Eric Reed** (ereed@shutts-law.com) have details. Teams are forming now.

Finally, a few congratulatory notes: YLS Board Member **Ryan Davis** was named equity partner in his firm, Winderweede, Haines, Ward & Woodman, back in late November and this is the first opportunity we've had to congratulate him on that. We also say goodbye to an old friend in **Chris Wasula**, who has resigned her position as YLS Board Member as she embarks on a new venture that's somewhat unrelated to the practice of law and gives new meaning to the words "bar association." We'll be announcing a new board member in her seat soon. We also want to pass on some congratulations to **Sarah Reiner**, YLS Secretary, and **Molly Young** for heading up (no pun intended!) the **Helmet Project**. With the help of Children's Safety Village, the Young Lawyers were able to hand out 115 bicycle helmets to kids at Riverside Elementary School.

Don't forget our **January Luncheon** at 11:45 a.m. on January 18th at the Citrus Club. RSVP to OCBAYLS@gmail.com to reserve a spot; \$18 in advance, \$20 at the door and \$10 for government attorneys and sole practitioners. Bring a toy for Holidays in January!

Here's to a great 2007!

Judith A. Garabo is an associate with the firm of Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.

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it. Also, if the jury asks to hear the testimony again, they'll get to re-experience your courtroom demonstration.

5. Don't call the court reporter 10 minutes before you need one. Several of the court reporters I spoke with commented that some attorneys didn't call to reserve a court reporter until the last possible moment. Some attorneys waited even longer – waiting until everyone else was assembled before realizing they'd neglected to request a court reporter. While reporters strive to be professional, it's difficult for them to be at their best when they're called upon at the last moment and forced to rush madly to the interview or court hearing. The more notice you give them, the better prepared they will be.

6. Slow down. Good court reporters can comfortably transcribe up to 220 words per minute. But when you get excited and have gusts of 300+ words per minute, you can't expect them to keep up. When you or your witnesses speak that fast, the court reporter must interrupt the flow of your presentation and ask you to slow down or repeat a phrase. To ensure you're keeping a proper pace, periodically steal a glance at the court reporter. If you see steam rising out of her ears or from her stenographic machine – SLOW DOWN! If you know you're prone to speaking quickly, write the words "SLOW DOWN" on a sheet of paper and place it on the lectern. If you have a good relationship with your court reporter, give her permission to (politely) interrupt you when you start speaking too fast. Court reporters are trained to listen. If they can't keep up with your pace, you can bet that the jurors can't keep up with you, either.

7. Be specific. Read this sentence aloud and see if you can properly interpret it: "Huey, Dewey, and Louie were watching a play with Donald. Then he jumped out of his seat, yelled, 'Sic semper fidelis,' and threw a tomato at the actors."

Here's your \$64,000 question: Who threw the tomato?

In court or in the depositions, it might be apparent who threw it, but in your record, you should avoid generic pronouns and use specific language to describe what happened. Don't overdo it, but make sure you know who you're talking about. When you hear your witness referring to someone as "he" or "she," interject occasionally to clarify:

- "Who threw the tomato?"
- "When you say 'he,' are you referring to Donald?"
- "To clarify for the record, it was Donald who threw the tomato, right?"

8. Look up and speak for the record. One of the less obvious tips the court reporters shared was about how your posture affects your record. When you read case citations or quote extensively from caselaw, you probably have a tendency to talk into the piece of paper or down to the paper on your desk. When you look at your papers, rather than looking up at the judge or the person you want to persuade, your voice comes out mumbled, you speak too fast to be understood, you don't pronounce each word individually, and your record comes out garbled. To create a better record, stand up straight, minimize your dependence on your notes, and look at the person you want to persuade.

9. Bring copies. If you're going to quote extensively from caselaw, bring a copy of the case for the court reporter. As mentioned above, you tend to speak faster when you're reading from a case, so you increase the chances of confusion

or mistake. Giving the court reporter a copy of what you're reading will guarantee that the record accurately reflects what you said. If you can bring a spare copy of the jury instructions, too, you'll quickly make friends with all of the court reporters in your courthouse.

10. Say your name clearly. You're probably not as famous as you think you are. If you walk into the courtroom and you don't know the court reporter, the court reporter probably doesn't know you, either. Even if you do, it's a good practice to announce yourself, your firm's name, and who you represent for the record. (Unless your name is "Jim Smith," you might want to spell your name, too.) Before you leave the courtroom, make sure you hand the reporter your business card. That way, if the court reporter needs to contact you for clarification or to ask if you need a transcript, she'll know who you are and how to reach you.

11. "Strike That!" doesn't do anything. Do you want to know a secret? Saying "Strike that" doesn't actually strike anything from the record. When you examine the written record of your trial, that lousy question will stare right back at you, followed by "Strike that!" (The only thing that phrase does is make you sound like a lawyer.)

Even if the judge strikes an answer from the record and tells the jurors to disregard it, the words will remain permanently etched in the court record. The court reporter can't remove the language from the record. Rather than saying "Strike that," a better practice is to say, "I didn't put that very well. Let me ask you a different question."

12. No "uh huh" or "uh-uh's." Demand verbal answers from your witness. Most of us understand what "uh huh," "uh uh," and shakes or nods of the head mean because we see the body language our witness uses when answering the question. By the time your case reaches the appellate level, however, it is reduced to a written record. Those non-verbal gestures won't be transcribed. Simply asking your witnesses to respond with a "Yes" or a "No" could save you from writing an appellate brief. Don't be afraid to interrupt and comment, "I'm sorry - the court reporter is only supposed to write down what you are saying, not what you are doing. Rather than nodding your head, could you answer out loud with a 'Yes' or 'No', please?" This is even more important during depositions and motion hearings, because it's difficult to impeach a witness based on "uh huh" or "uh uh" responses:

Lawyer: The light was red, wasn't it?

Witness: Huh uh.

Did the witness agree with the lawyer or not? The lawyer had given this witness unlimited wiggle room. The record could fairly support either an affirmative or a negative answer. Spend the extra moment to clarify answers for the record, and you might save yourself hours of additional work.

End of Part 1

Part 2 – Will be continued in the February issue of *The Brief's*

Elliott Wilcox is the editor of Trial Tips Newsletter. To collect your free special report, "How to Become the Best Trial Lawyer in Your Courthouse - The Top Ten Tips for Trial Lawyers," send an email with the subject line "OCBA" to FreeTips@TrialTheater.com



Rainmaking 101

Rainmaking Lesson 7

Mark Powers



Think about this: Many of your referral sources are sending business to other attorneys in addition to what they send you. They may like you, but for whatever reason, they are spreading the work out to two or three other attorneys, so you only receive 25% or 30% of their work. In some cases, this is an appropriate allotment due to your limited areas of specialization - but in some cases the work is spread out due to other factors.

Unfortunately, they may never tell you about these other factors that influence to whom they'll send work. Perhaps your turn-around time is too slow. Or maybe you don't keep them informed well enough. It could be you haven't treated their referrals the way they think you should and they've gotten negative feedback about your office. Or maybe you take your referral sources for granted and haven't thanked them lately for the clients they send.

A great many attorneys make this same mistake: They ignore the substantial revenue that their referral sources provide and are caught off guard when one defects. Have you ever had a referral source just drop off the radar screen? Someone who used to send a lot of business, then stopped for some reason? She hasn't moved, died or changed her business model and you don't know why the referrals just stopped.

Find out.

And don't wait until something negative happens. Here's more bad news: If you don't take very good care of your referral sources, someone else will. Competition for referral sources is on the increase. If you haven't thought about your referral sources as the valuable asset that they are, calculate their worth to you, not just over the course of one year, but over the lifetime of your practice. One good referral source can send many thousands of dollars worth of business, sometimes hundreds of thousands of dollars. If you want them to feel as important as they are, ask their opinions on your practice and how it serves the people they send.

Interestingly enough, an opinion-gathering conversation like this is useful for far more than just gathering information. It builds rapport and intimacy. Why? Because, as with all of our strategic interviews, the individuals you ask questions of will come away complimented that you asked their opinions. From their perspective, it means you care about them and value what they think. It signals that you are paying attention to their needs and those of their clients. It indicates you are not just taking their referrals for granted but recognize their importance to your success.

To try this for yourself: Go out and interview three to five people who have referred you business in the past. Start out with the ones you are most comfortable with, just to get your feet wet. Then specifically target those you'd like to receive more business from in the future. Lead off the conversation with your version of the following statement:

"I admire and respect the way you do business (or, I'm always trying to improve the level of service to our

clients), and I'd like to ask your opinion on something. Is there anything I can do to improve how I handle the clients you send me?"

The referral source may initially refuse to say anything negative in response to this question. Press the person gently by asking first a more positive question, then moving to more pointed questions:

"OK. What do you think we do well?" Wait for the response, then say, "Could we improve on any of those aspects of the practice?"

Then move to, "Is there anything you suggest I stop doing, or change completely, about how we deal with clients?"

Alternately, you might ask, "What are three things you'd suggest I could do better?"

It is of paramount importance that you not go into a defensive posture if any negative comments are made. This will shut down the flow of information and indicate that you really weren't open to constructive suggestions. View any nuggets of information gleaned from the conversation, whether they be positive or negative, as very valuable and thank the person for her opinions. Don't provide excuses, don't accuse the referral source of having impossible standards, just thank her and say that you'll use everything she mentioned to enhance the level of service you provide to clients. Nine times out of ten, referral sources won't have anything substantially negative to say, but will just be complimented that you've asked them. This conversation opens the door to more referrals from that referral source, who could be spreading the work around to other attorneys. Why? Because you cared enough about her clients to ask these kinds of questions. And we guarantee you – most of the other attorneys she may be sending work to, do not.

The power of this strategic conversation lies in the unique advantage it creates – it sets you apart from your competition and increases the likelihood that when that referral source has a client to send, she thinks of you. We call it "Top Of Mind Awareness," and you can't succeed without it. Test this theory for yourself and schedule an interview as a client development experiment – what do you have to lose?

Mark Powers is the President of Atticus, Inc. and a regular contributor to The Briefs. Mark co-authored "The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners" and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.



Financial Planning

The Insurance Advice Conundrum



Andrew C. Orr, CFP®, CLU, ChFC, AIF®

So, you have an appointment to meet with an insurance agent. Great. Insurance is a good thing. Here is a little friendly advice from someone who's been there...on the other side of the desk.

Before becoming an independent financial planner, I worked for a well-known insurer for fifteen years. As new agents, we were told to make calls to professionals, and we dutifully did. We were told to "be referred," which allowed us to say something like, "Joe Smith said that we should get together," and that was better than a cold call. We learned all sorts of tricks, like calling before opening hours, or after closing hours because successful professionals worked hard and long hours. We also were taught to use small talk for openers and "approach language" to explain why we were there. All solid sales strategies.

Our company, like all insurers, wanted us to obtain a litany of personal and confidential information from you, the prospect, including goals and objectives and how much insurance you currently have and how you feel about that coverage. We learned that to be the most productive, we really only needed to have one product to sell, instead of suggesting a variety. Thus, all conversational roads led to a discussion of "this great idea, tax strategy, or asset protection device."

The person behind the desk, you, that is, generally knows that this is going on and there likely is tension in the air. Still, the agent is polished, well dressed and professional, and might be asking the right questions.

After all, you say to yourself, "I know my life insurance is probably not sufficient and what is this about disability coverage?" Still, you may not accept the agent's invitation to take your information back to his or her office and put together an analysis or "some ideas" to look at during a subsequent meeting.

Life insurers tell their agents that it takes at least five of these initial meetings to receive one client. And it takes ten referrals to even get the initial meeting. To compensate for this, agents are constantly "smiling and dialing" throughout their day to secure more appointments so they can meet "their" goals. Every insurer does this. After all, an insurer is a product manufacturer and desires to sell the most products in the least amount of time. So, they have designed incentive systems that reward above-average sales production and high levels of "activity."

You may know where I am going with this.

Such a system makes good sense for the insurer and has been the norm from the beginning of the industry back in the 1800s. It also is fraught with conflict of interest.

As clients, you have to trust that the agent is making a recommendation based on what is "in your best interest," but, in Florida, there is no legal requirement to do so. And, while most agents are indeed good people, they are unable to prevent making highly conflicted recommendations and are hard pressed to recommend better alternatives because of the compensatory system they are in themselves. One-hundred-percent commission

income will lead even the best-intended agents to push products because they themselves have financial obligations to meet.

Now, we all know that insurance is needed, whether it is life insurance to protect our loved ones or to provide liquidity in a large estate, disability insurance to provide needed income in a personal crisis, liability insurance to provide asset protection, homeowners coverage, etc. And most folks need a trusted professional to advise us on what is appropriate and at what levels and, more importantly, what is not appropriate.

Such a professional needs to be free of conflict of interest. If you cut the tie between financial product compensation and financial advice, you can be more certain that the advice isn't tilting one way or the other because the advisor needs to get paid.

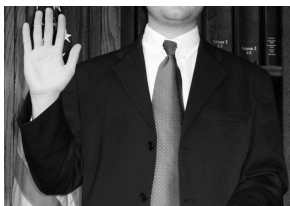
Where can such a professional be found? Fee-only life insurance advisors are one solution. However, they are rare as rooster eggs. Probably the best known is Peter Katt (www.peterkatt.com), although his advice isn't necessarily cheap. It is, however, free of conflict and he does know life insurance.

The downside is that such an advisor only looks at one aspect of your life, yet there are many facets to your financial situation to be taken into account. Because of the need for a more comprehensive analysis and plan, a fee-only financial planner might be a better choice. His or her primary consideration is *your* best interest, otherwise known as a "fiduciary standard of care."

Compare that to "suitability" standards of most state insurance regulators. As long as the product is "suitable," the sale can be defended. But lots of product transactions can be suitable, yet not be in your best interest. For example, perhaps better rated and lower cost insurance companies are available yet you are not told about them. Maybe lower commission "blends" of the product are available yet are never shown to you. Always look for the better blends. A fee-only financial planner can assist you.

When searching for a fee-only advisor, however, ask if he or she has extensive knowledge about insurance. Many fee-only planners actually have been trained in the investment brokerage side of the industry as opposed to having received their start in the business with an insurer. If the planner is not skilled in the vagaries of insurance, he or she should have a strategic partnership with someone who does. A fee-only planner with an insurance background is probably well equipped to guide you in this area considering all the experience. The planner knows the inside of this somewhat non-transparent industry and can steer you to the solutions that are better for you, not the insurance company.

Andrew C. Orr, CFP®, CLU, ChFC, AIF®, is an independent, fee-only financial planner located in Orlando. He is President of ORRGROUP, a registered investment adviser and financial life planning firm providing comprehensive financial management services to individuals and businesses. For more info, visit: www.orrgroup.com.



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Speaking Engagements

Thomas E. Rhodes and **Paul D. Newnum** presented a seminar entitled “The Imbalance of Power in Mediation” at the 15th Annual Dispute Resolution Conference in Orlando. Out of 37 separate seminar presentations at the three-day event, theirs received the second highest score – 9.7 out of a possible 10 points. Both attorneys are Florida Supreme Court Certified Family Mediators and mediate family law cases for the Ninth Circuit; they are available for private family mediation as well.

Samuel P. King and **Kenneth J. McKenna**, partners in the law firm Dellecker, Wilson, King, McKenna & Ruffier, recently served as a faculty presenters for the National Business Institute’s seminar on “Plaintiff’s Personal Injury: Practice Tips and Application.” The seminar took place in Orlando on Dec. 4th and was approved for 7.00 CLE. The presentation focused on the basics of civil practice and procedure and trial techniques. Topics included statutes that affect liability evaluation, understanding the law of damages and tips on jury selection, the presentation of evidence and avoiding the most common mistakes made by new attorneys.

Seminars

Jan. 25-27: Florida Bar CLE & Family Law Committee. Marital & Family Law Review Course. Disney’s Grand Floridian.

Feb. 1: FAMU. *Contempt of Court*. 5:30 p.m. FAMU College of Law.

Jan. 22: Tort Law Committee. Topics in Tort Law. 1:00 p.m. - 5:00 p.m. Location TBA

Feb. 14: International Law Committee. *Pratfalls, Pitfalls, and Profits of Foreign Investors in U.S. Real Property Transactions*. Time/Location TBA.

Feb. 21: Business Law Committee. *What Every Litigator Needs to Know*. 9:00 a.m. - 5:00 p.m., or half-day sessions. CLE: 1.0 to 7.0. OCBA Center.

Please see the OCBA website at www.orangecountybar.com for the most current information and registration forms.

News to Note

The Judges of the Ninth Judicial Circuit will hold a FREE series of seminars beginning in January for anyone interested in learning about our judicial system and how our courts operate. Inside the Courts is a 4-part program that gives participants a behind-the-scenes look at our judicial system. Event dates are on the following Tuesdays: Jan. 16, 23, 30; and Feb. 6. All seminars will be held from 6:30-8:30 p.m. at the Orange County Courthouse, Jury Assembly Room, 425 N. Orange Ave., Orlando. This event is free and open to the general public. Each session is unique so participants should plan to attend each night. Those attending 3 of 4 sessions receive a certificate of recognition. Registration is required due to limited seating; call 407-836-0517 to register.

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Code: CODRIPARALEGALIN

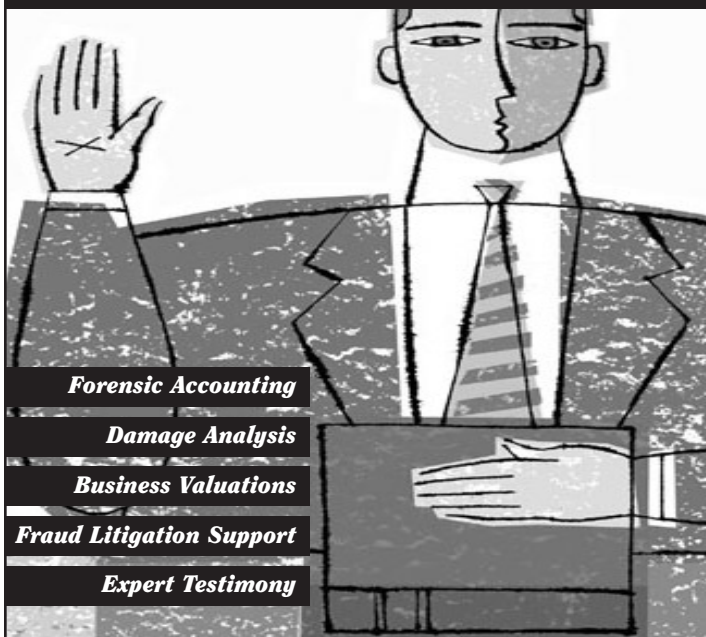
Paralegal - Corporate & Securities

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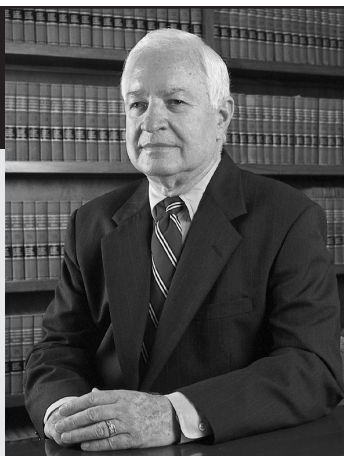
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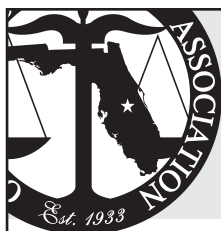
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2007

January - February Calendar

OCBA Luncheon • January 11, 2007

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RSVP by January 9th to reservations@ocbanet.org

January

2 Criminal Law Committee
12:00 p.m. • Bar Center

4 Elder Law Committee
12:00 p.m. • Bar Center

Federal Judicial Relations Committee
12:00 p.m. • Judge Conway's Chambers

OCBA Paralegal Committee
5:30 p.m. • Bar Center

5 Diversity Committee
8:00 a.m. • Bar Center

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

8 Central Florida Family Law Inn of Court
5:30 p.m. • Adair's in College Park

9 OCALSS
5:30 p.m. • Bar Center

10 Executive Council Meeting
11:30 a.m. • Bar Center

Estate Guardianship & Trust
12:00 p.m. • Bar Center

International Law Committee Seminar
"U.S. Employment/Labor Laws"
Contact Kim Radcliffe
407-649-9192
12:00 p.m. • GrayRobinson

Judicial Relations Committee
12:15 p.m. • Orange County Courthouse
21st Floor Conference Room

11 Legal Aid Society Executive
8:00 a.m. • 100 E. Robinson St.

OCBA Luncheon
The Honorable Barbara J. Pariente
11:30 a.m. • Downtown Marriott

12 Workers' Compensation Law
11:45 a.m. • Bar Center

Celebration of Accreditation
4:30 p.m. • Barry University

16 Legal Aid Society Board Meeting
11:45 a.m. • 100 E. Robinson St.

Professionalism Committee
12:15 p.m. • Bar Center

Inn of Court
5:30 p.m. • Dubsdread

18 Young Lawyers Luncheon
11:45 a.m. • Citrus Club

Hispanic Bar Association
5:30 p.m. • TBA

Paul C. Perkins Bar General Meeting
6:00 p.m. • FAMU College of Law

Health Law Committee
6:00 p.m. • GrayRobinson

19 Family Law Committee
8:00 a.m. • 425 N. Orange Ave., #2310

22 Tort Law Seminar
1:00 - 5:00 p.m. • Bar Center

23 Young Lawyers Board Meeting
5:30 p.m. • Bar Center

24 CFACDL
11:45 a.m. • Sorosis Club

25 OCBA Wine & Cheese Fest
5:30 p.m. • Beluga's

25/26 2007 Marital & Family Law Review Course
8:00 a.m. • Grand Floridian
FL Bar: 850-561-5831

26 Bankruptcy Law Committee
12:00 p.m. • Bar Center

Labor & Employment Committee
12:00 p.m. • Bar Center

29 CFAWL Board Meeting
12:00 p.m. • Bar Center

31 Business Law Committee
12:00 p.m. • Baker Hostetler, SunTrust Bank Bldg.

February

1 Elder Law Committee
12:00 p.m. • Bar Center

OCBA Paralegal Committee
5:30 p.m. • Bar Center

"Contempt of Court" - CLE 1 hr.
5:30 p.m. • FAMU College of Law
RSVP by 1/24
Ruth Singer - 321-604-5310

2 Diversity Committee
8:00 a.m. • Bar Center

CFAWL Bar Luncheon
11:30 a.m. • Citrus Club

6 Criminal Law Committee
12:00 p.m. • Bar Center

OCALSS Meeting
5:30 p.m. • Bar Center

8 Legal Aid Society Executive
8:00 a.m. • 100 E. Robinson St.

Real Property Law Committee
12:00 p.m. • Bar Center

9 Workers' Compensation Committee
11:45 a.m. • Bar Center

12 Central Florida Family Law Inn of Court
5:30 p.m. • Adair's in College Park

13 Executive Council Meeting
11:30 a.m. • Bar Center

14 International Law Seminar
"Pratfalls, Pitfalls, and Profits of Foreign Investors in U. S. Real Property Transactions"
1:30 p.m. • Bar Center

Estate Guardianship & Trust Committee
11:30 a.m. • Bar Center

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